ALLPORT ALFRED JAMES

v.

WONG SOON LAN

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[DIVORCE PETITION NO. 593/87]
7 DECEMBER 1988

CIVIL PROCEDURE: *Non-compliance with injunction - penal notice not indorsed on order - Contempt proceedings - Quasi-criminal - Prescribed procedure to be complied with strictly.*

This was an application for an order of committal on the ground that the respondent had committed contempt of Court in disobeying an *ex-parte* order restraining her from the disposing the proceeds of sale of matrimonial property. The *ex-parte* order was served on the respondent. The issue was whether the omission of the penal notice that process of execution would be issued if the respondent did not comply with the order was fatal.

Held:

[1] The power to punish any person for civil contempt was quasi-criminal in nature. The prescribed provision in O. 45 r. 7(4), Rules of the Supreme Court that the penal notice must be indorsed on the order must be strictly complied with as the liberty of a person was involved.

[Application dismissed.]

Cases referred to:
Husson v. Husson [1966] 3 All ER 1056
United Telephone Co. v. Dale [1884] 25 Ch D 778
Hampden v. Wallis [1884] 26 Ch D 746
Stockton Football Co. v. Gaston [1895] 1 QB 453

Legislation referred to:
Rules of the Supreme Court [Sing], O. 45 r. 7(4), (6)
Rules of the Supreme Court 1883 [UK], O. XL1 r. 5

Other source referred to:
White Book [1988], para. 45/7/6

For the applicant/petitioner - Vijay Perumal
For the respondent/defendant - J.S. Yeh

JUDGMENT

Chao Hick Tin JC:

By this motion the petitioner applies for an order of committal to be made against the respondent on the ground that the respondent has committed contempt of Court in disobeying an *ex-parte* order made on 2 April 1987 restraining her from disposing the sum of $313,000, being the proceeds of sale of the matrimonial property, situated at 14 Fulton Road, Singapore.

The said *ex-parte* order was served personally on the respondent on 3 April 1987. On an application by the respondent to discharge the interim injunction, the Court on 22 May 1987 ordered that the said interim injunction be continued.

The petition for divorce was heard over four days in January/February 1988, at the end of which, Dr. A P Rajah J granted a decree *nisi* to the petitioner on the ground that the marriage had irretrievably broken down in that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with her. The interim injunction granted on 2 April 1987 was ordered to be continued. On 15 April 1988, leave was granted to the petitioner to make an application for committal of the respondent for contempt. The hearing before me now is on this application for committal. On the facts before me, it is clear beyond a shadow of a doubt that the respondent had failed to comply with the injunction granted on 2 April 1987. The terms of the order are clear. In her affidavit filed on 30 November 1988 in answer to this application, the respondent states the following:

> After receipt of the said order which was served on me at my resident ... I consulted my former solicitor who explained to me that I could not spend the proceeds of sale of the matrimonial property.
>
> I had spent the money. However, I do not know and had no reasons to suspect of the consequences of a breach of such an order.

There is only one real issue for me to decide and that is this. Can this Court enforce the injunction by a committal order when a copy of the order that was served on the respondent on 3 April 1987 was not indorsed with the penal notice as required under O. 45 r. 7(4) of the Rules of Supreme Court. It is not in dispute that the order of 22 May 1987 ordering the continuation of the interim injunction also did not contain any penal notice. Order 45 r. 7(4) provides that there must be indorsement on the copy of the order served on the person, a notice that if he disobeys the order, he is liable for process of execution to compel him to obey it.

However, under r. 7(6), it is provided that a prohibitory injunction may be enforced even though it has not been served if the Court is satisfied that pending such service the person against whom it is sought to enforce the order has had notice thereof either by being present when the order was made or by being notified of the terms of the order. Following from r. 7(6), every order requiring the person to do an act, i.e., mandatory order, must be served on the person before it may be enforced against him.

Counsel for the petitioner argues that since a prohibitory injunction may be enforced even though it has not been served provided that the person has notice of the order, it follows that the omission to indorse the penal notice on the order could not be critical. He contends that this is purely a technical omission and the respondent knew perfectly well she has to comply with it as she even applied to have the order discharged which was refused by the Court. Counsel relies on two cases: *Husson v. Husson*, [1966] 3 All ER 1056 and *United Telephone Co. v. Dale* [1884], 25 Ch D 778. However, these two cases were concerned not with the question as to the consequences of the omission of the penal notice but with the question of service. These two cases decided that even though no copy of the order was served on the defendant it could be enforced against him so long as he had notice of the order - being present in Court when the order was made.

Paragraph 45/7/6 of the *White Book* (1988) states the following as regards the need for a penal notice:

> It is a necessary condition for the enforcement of a judgment or order under r. 5 by way of sequestration or committal that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon. This must be indorsed on the copy for service of all orders which are required to be served, whether personally or not ...

The Court's powers to punish any person for civil contempt are quasi-criminal in nature. Where there is prescribed any procedural step to the exercise of that jurisdiction, that rule should be scrupulously observed and strictly complied with. From r. 7(4) and (6) of the RSC cited above, it is clear that the distinction between a prohibitory injunction and a mandatory injunction lies in the fact that enforcement of a prohibitory injunction may be effected even though personal service of the order has not been effected provided that the person against whom the injunction is made has notice of it. For a mandatory injunction personal service must be effected before enforcement may be taken. I do not think anything more should be read into r. 7(6). It can in no way be interpreted to excuse the non-compliance of the requirement of the indorsement of a penal notice. The rationale for the enforcement of a prohibitory injunction notwithstanding that the order has not been served is clear. It is basically to prevent a party who knew of the order made against him to act contrary to it before the order is served on him. On the other hand, the rationale for a penal notice is to ensure that the person against whom the order is made fully appreciates the consequences of any non-compliance. This point did not arise and was not considered in *United Telephone Co*. In my opinion, the omission to indorse the penal notice on the order served on the respondent is fatal.

I find support for this view in the case *Hampden v. Wallis* [1884], 26 Ch D 746. In that case, the defendant was ordered to file within seven days after service of the order an affidavit of documents in his possession. The order was served on his solicitors as was permitted by the rules. The copy of the order did not have indorsed on it, the notice required by O. XL1, r. 5 of the Rules of Supreme Court 1883, warning the person to obey the same, and that he would be liable to a process of execution if he failed to obey it. At first instance, Chitty J held that as the order was served on the defendant's solicitor and not on the defendant personally, the requirement of a warning notice did not apply to the situation as the solicitor "must be taken from his professional position to be fully aware of the penalties of disobedience." This decision was overruled by the Court of Appeal (Lindley LJ dissenting on a different point) where Baggallay LJ said:

> With every respect for the learned Judge's opinion, I cannot take the same view of the construction of the rule. The order relates to all judgments, and r. 5 is perfectly general in its tone; there is nothing in it limiting it to any particular kind of orders. It is suggested that it was intended to be confined to process of contempt. I can see no ground for confining it in that way. Then the question is whether it applies only to cases where the order is served on the person required to obey it. When we look at O. XXXI r. 22, we find that service on the solicitor shall be sufficient service - that must mean sufficient for all purposes - in order to found an application for an attachment. If the service is on the solicitor to communicate it to the party, and he is himself liable to an attachment if he fails to do so. Therefore, this being a sufficient service to support an attachment, it appears to me clear to support that the provisions of O. XLI r. 5 apply. On this point, therefore, I am unable to come to the same conclusion as Mr. Justice Chitty. I think the proceedings for attachment have failed by reason of the want of the proper indorsement.

The importance of the indorsement of the penal notice is further illustrated by the case *Stockton Football Co. v. Gaston* [1895] 1 QB 453 where in the affidavit filed and served in support of a motion for attachment it was not stated that the order was indorsed with the notice. Kennedy J said at p. 454:

> It is clear that applications of this nature ought to be made in strict conformity with the rules of Court, and therefore, by the terms of O. XL1 r. 5, the order required to be obeyed must be served, with an indorsement upon it, stating the result of neglecting to obey the

order. The defendant would be entitled to assume that the affidavit served with the notice of motion contained the evidence relied on. In the present case the service was clearly irregular, for the affidavit did not show that the order of the registrar, when served on the defendant, had indorsed upon it any memorandum such as is required by the rule to which I have referred. No doubt an affidavit was afterwards served, with the order, duly indorsed, exhibited to it, but this does not amount to a sufficient statement that the order did in fact contain the necessary indorsement at the time when it was served on the defendant. The proceedings are penal, and the rules must be strictly observed.

One final point. The argument is made that the position in our case here may be treated as if no order had been served on the respondent and following r. 7(6) execution can be effected. I do not think it proper for me to disregard the fact that the order was served and it was without the penal notice. For me to accept this argument would really amount to saying as that an order for a prohibitory injunction need not be drawn up as required by r. 7(4) before enforcement may be carried out. I would in effect be deciding that r. 7(4) has no application to a prohibitory injunction. That will be in direct conflict with what is stated in r. 7(4). This Court should not be doing that. As the liberty of a person is involved in such proceedings, the prescribed rule must be strictly observed.

In the circumstances, and much that I regret it as the respondent has clearly breached the injunction, this application must fail. Though the point appears technical, it is the very foundation upon which the power of the Court to commit a person for contempt under O. 45 of the RSC rests. In the result, I make no order on the motion. Having regard to the circumstances of the case, I also make no order as to costs.

Also found at [1989] 1 CLJ 271